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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1004

THE STUYVESANT INSURANCE COMPANY,
Petitioner.

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS.

# Respondent's Brief in Opposition to Certiorari.

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Respondent is not dissatisfied with the petitioner's citation of the opinion below. Respondent disputes the statement of jurisdiction on the grounds that the petitioner has not satisfied the requirement of 28 U.S.C. 1257(3) for the reasons stated below.



## STATEMENT OF THE CASE

The petitioner seeks review of a decision upholding the forfeiture of a bail bond by the surety upon default of the principal.

A bail bond was executed by the petitioner, Stuyvesant Insurance Company, on December 3, 1976 in the amount of $2,000 guaranteeing the appearance of Vincent R. Sestito. (R. 49-51). Sestito was indicted on drug charges on February 10, 1977. (R. 60). On February 23, 1977 he was defaulted but the default was removed on March 7, 1977 when defendant appeared and pled not guilty at his arraignment. (R. 60). The docket reflects several continuances. (R. 60). On November 7, 1977 Sestito was

defaulted and a capias was issued to the District Attorney. (R. 60).

On April 24, 1978 a complaint was filed by the Commonwealth against Stuyvesant seeking to recover the face amount of the bail bond. Copies of the indictment and bail bond were filed with the complaint. Stuyvesant filed a motion to dismiss on May 8, 1978 citing the failure to join the principal. (R. 44; 45; 53).

On July 5, 1978 the Commonwealth moved for summary judgment and an affidavit by an Assistant District Attorney was submitted in support thereof. The complaint and affidavit read together alleged that Stuyvesant had entered into the bail bond agreement; that the principal was called



into court but failed to appear and was defaulted; and that Stuyvesant by the terms of the bail bond, was indebted to the Commonwealth for the sum stipulated therein. (R. 54-56).

On July 12, 1978 Stuyvesant submitted an affidavit by Thomas Corey in opposition to the Commonwealth's motion for summary judgment. The affidavit stated that the address of the principal contained on the bail bond made the principal subject to service of process at that address. Stuyvesant's affidavit also stated that it, as surety, was not notified of the principal's required appearance dates; that "upon information and belief" the principal was not properly notified of his appearance

date; and that in other jurisdictions a surety is given notice of the appearance dates of its principal. (R.57-58).

On July 20, 1978 Stuyvesant's motion to dismiss for failure to join the principal was denied and the Commonwealth's motion for summary judgment was allowed. (R.54).

Stuyvesant filed an answer on July 27, 1978 in which it alleged that the bail bond was voided prior to the default; that the Commonwealth contributed to the non-appearance of the principal; and that Stuyvesant was not notified of the appearance dates or called into court. (R.62-63).

Summary judgment against Stuyvesant was ordered for the full amount of the bond on August 8, 1978. (R.67).



The petitioner filed a notice of appeal in the Massachusetts Appeals Court. On June 29, 1979 the Appeals Court affirmed the lower court's judgment. On July 19, 1979 the petitioner filed an Application for Further Appellate Review by the Supreme Judicial Court. On September 28, 1979 the application was denied.

## Reasons for Denying the Writ

### CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONER FAILED TO PRESENT ITS CONSTITUTIONAL CLAIM TO THE STATE COURT.

The Supreme Court of the United States may review state court judgments only where a title, right, privilege or immunity is specially set up or claimed under the Federal Constitution and such claim is first presented to the state courts with

fair precision. Crowell v. Randell, 10 Pet. (35 U.S.) 368, 390-397 (1836); Cardinale v. Louisiana, 394 U.S. 437, 438-439 (1969); 28 U.S. C. 1257(3). If the highest state court has failed to decide the Federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this court can affirmatively show to the contrary." Street v. State of New York, 394 U.S. 576, 582 (1968). The respondent submits that the petitioner in the instant action has failed to establish that the threshold jurisdictional requirement of 28 U.S.C. 1257(3) has been met. The constitutional claim now being raised was not argued or



briefed in the Appellate Court nor was the Massachusetts Appeals Court apprised of the fact that a Federal constitutional claim was being advanced. The petitioner included two ambiguous references to "due process" in its 35-page brief to the state appellate court and those allusions were offered to support Stuyvesant's contention that a 1975 Massachusetts decision impliedly required notice to a surety prior to forefeiture under the bail system. The Massachusetts court was not thereby informed that any Federal right, privilege, or immunity was being asserted and it "proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

Oxley Stave Co. v. Butler County, 166 U.S. 648, 655 (1897). The mere recital of the words "due process" absent any reference to the United States Constitution or any rights thereunder, do not impart a Federal constitutional dimension to an action. It may be assumed that the petitioner was referring to the state constitution which includes a due process clause, affording no basis for invoking the court's jurisdiction. Bowe v. Scott 233 U.S. 658, 665 (1914); New York Central & H.R. Co. v. New York, 186 U.S. 269, 273 (1902). New York ex rel Bryant v. Zimmerman, 279 U.S. 63, 67-8 (1928).

This court's "only power over state judgments is to correct them to the extent



they incorrectly adjudge Federal rights." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 565 (1976). Since no Federal rights were previously asserted, or decided the respondent respectfully submits the petition should be denied.

Respectfully submitted,

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